United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7299

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

ISAAC JAROSLAWICZ and JOSEPH JAROSLAWICZ,

Plaintiffs-Appellants,

vs.

ALBERT A. SEEDMAN,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS

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ISAAC JAROSLAWICZ and JOSEPH JAROSLAWICZ,

Plaintiffs-Appellants,

vs.

ALBERT A. SEEDMAN,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' BRIEF

Statement of the Issues Presented for Review

1. Was the Court below correct in granting the defendant's motion for summary judgment where the defendant had made certain admissions in a book written by him which directly contradicted statements made in his affidavit in support of his motion for summary judgment and put his credibility in doubt ?

2. Was the District Court correct in granting summary judgment to the defendant despite the fact that the defendant had failed to meet his burden of showing the absence of any genuine issue of material fact ?

3. Was the District Court correct in granting the defendant's motion for summary judgment by drawing inferences from the available facts in favor of the defendant who was the party moving for summary judgment ?

4. Was the District Court correct in granting the defendant's motion for summary judgment by finding that the defendant had acted in 'good faith' despite admissions made by the defendant in a book he has written that he had not acted in good faith, but was under pressure to make a quick arrest and arrested the plaintiff largely as a matter of convenience?

Statement of Facts

Nature of the Case

This is an appeal from an order of the Honorable Walter Bruchhausen of the United States District Court for the Eastern District of New York granting the defendant's motion for summary judgment and dismissing the plaintiffs' complaint.

The plaintiffs in this action are Isaac Jaroslawicz, who at the time of the incident was an eighteen year old student, and Joseph Jaroslawicz, his father and natural guardian.

On or about October 20, 1971 some unknown person fired four shots through a window of the Soviet Mission to the United Nations located in the City of New York (JA 14). The defendant, Albert A. Seedman, at that time was the Chief of Detectives of the New York City Police Department (JA 14). The defendant personally took charge of the police investigation regarding the incident (JA 14, 49) and admittedly was under abnormal pressure to obtain fast results in making an arrest (JA 51, 50).

The defendant claims that a search of the premises across the street from the Russian Mission uncovered a rifle which a ballistics test revealed was used to fire the shots at the Soviet Mission. The origin of the rifle

was traced to a certain gun dealer in Hempstead, New York (JA 15). The defendant claims that the next afternoon certain detectives under his command (JA 15) visited the gunsmith shop and spoke to two employees, Sol Jacobson and Kenneth Aull (JA 15). The gunsmith's records indicated that the rifle in question had been sold to one Henry Faulkner of 830 Arthur Avenue, Bronx, New York. The name was false and the address was non-existent (JA 15). The defendant claims that because the target of the shooting had been the Soviet Mission, the Jewish Defense League ("JDL") was suspect (JA 15). The two employees at the gunsmith shop were shown photographs of JDL members (JA 16, 51). The defendant alleges that upon being shown these photographs, both employees at the gun shop identified the plaintiff Isaac Jaroslawicz (JA 51). * In his affidavit sworn to the 13th day of February, 1975, the defendant gives a different version alleging that the plaintiff was one of two possible suspects identified by the gun shop employees (JA 16).

What occurred after the gun shop employees allegedly selected the plaintiff's photograph is unclear. On one occasion the defendant has said that immediately after the plaintiff's photograph was selected, detectives rushed to his home (JA 51), but the plaintiff was not home at the time. The defendant had ordered the plaintiff's photograph distributed

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*Unless otherwise stated, the plaintiff shall refer to the plaintiff Isaac Jaroslawicz.

and within two hours after the photographs were distributed a patrolman arrested the plaintiff at the corner of 67th Street and Lexington Avenue (JA 51).

In his affidavit, sworn to the 13th day of February, 1975, the defendant gives a different version of what occurred after the gun shop employees allegedly selected the plaintiff's photograph. The defendant there claims that the detectives in the company of the two gun shop employees observed the plaintiff in an automobile parked at 67th Street and Third Avenue. According to the defendant, a nameless detective requested the plaintiff to voluntarily accompany the police officer to a nearby stationhouse and that the plaintiff voluntarily entered the stationhouse at approximately 6:00 p.m. of that day (JA 16). The plaintiff alleges that certain New York City police officers under the defendant's command forcibly abducted the plaintiff into the Nineteenth Precinct stationhouse (JA 38). The defendant has never provided the name of the detective who allegedly requested the plaintiff to voluntarily accompany him to the stationhouse, nor has he submitted an affidavit from any such person in support of his motion for summary judgment.

After the plaintiff was in the stationhouse, the defendant again supplies two different versions of what occurred subsequent thereto. On one occasion the defendant alleged that after the plaintiff was in the stationhouse he arranged to have the two employees from the gun shop brought in to pick the plaintiff out of a lineup and that it was after 9:00 p.m. when the two men finally arrived at the stationhouse (JA 51-52). In his February 13, 1975 affidavit, the defendant claims that the two gun shop employees accompanied the detectives at the time they requested the plaintiff to enter the stationhouse at 6:00 p.m. (JA 16).

What took place during the lineup is again set forth by the defendant in two different versions. In one version, the defendant alleges that the plaintiff was put into a lineup with nine other men and that Jacobson, one of the gun shop employees, selected the plaintiff after some hesitancy (JA 52). In another version, the defendant claims that some time between 7:20 and 8:10 p.m. the plaintiff and Lawrence Fine, the other person whose photograph had been selected by the gun shop employees, were placed in a lineup together with seven other police officers and that the witness Jacobson selected a police officer out of the lineup (JA 16). In both versions the defendant claims that the other gun shop employee, Kenneth Aull, identified the plaintiff as the purchaser of the rifle in question (JA 16, 52)

The plaintiff alleges that the lineup was conducted in a manner so that the plaintiff would be selected. Among other things, the plaintiff claims that at the time of the lineup he was only eighteen years of age, while the other participants in the lineup were much older, that the gun shop employees had previously been shown photographs of the plaintiff on that very same day and that the lineup was otherwise conducted so as to insure that the plaintiff would be selected (JA 40). In addition, it appears that the two gun shop employees may have been present with the detectives when they observed the plaintiff in an automobile at the corner of 67th Street and Third Avenue (JA 16).

Once again we are given two different versions by the defendant of what transpired after the plaintiff was selected out of the lineup by Aull. The first version claims that since the plaintiff could not be charged with violating any laws of the State of New York, and the only crime he could be charged with was purchasing a firearm with false identification, the defendant called in the Alcohol, Tobacco and Firearms Division ("ATF") of the Treasury Department and requested them to arrest the plaintiff and charge him with purchasing a gun with false identification (JA 52). In another version, the defendant claims that the ATF agents were notified immediately after the plaintiff entered the stationhouse and were present thereat during the evening hours (JA 17).

The defendant also gives two different versions as to how the arrest of the plaintiff was affected by the ATF agents. In one version the defendant claims that the ATF "balked" at arresting the plaintiff, claiming that the case against the plaintiff was hardly overwhelming and admitting that the defendant would never have arrested the plaintiff under ordinary circumstances, but with everyone anxious to see a quick arrest, he was eager to have the ATF charge the plaintiff in this instance. In this version the defendant admits that he called Robert Morse, then United States Attorney for the Eastern District of New York, in an attempt to have Morse direct the ATF agents to arrest the plaintiff. After several hours he finally managed to contact Morse who after speaking with the defendant directed the ATF agents to arrest the plaintiff (JA 52-53).

In his other version, the defendant alleges that the ATF agents arrested the plaintiff pursuant to the direction of the United States Attorney for the Eastern District of New York and that the defendant had nothing at all to do with influencing the United States Attorney to arrest the plaintiff, nor did he play any role at all in the plaintiff's arrest (JA 17-18).

The plaintiff's arrest took place amid great fanfare and worldwide publicity (JA 42). The arrest appeared in a front page story accompanied by the plaintiff's photograph in all of the New York metropolitan newspapers.

After the plaintiff was arrested George Bush, the United States Ambassador to the United Nations was able to mollify the Russians by announcing that an arrest had been made (JA 53). Prior to the institution of this action, the defendant admitted that the lawyer for the JDL was hollering that the plaintiff was being "railroaded to placate the Russians" and that he has heard lawyers yell louder for less reason (JA 53).

Following the plaintiff's arrest, the plaintiff and his family received numerous threatening letters and telephone calls affecting the plaintiff's mental and physical well-being and requiring the plaintiff to receive medical attention (JA 42). The arrest and its attendant publicity ruined the plaintiff's future career plans and prospects (JA 42).

Needless to say, the plaintiff had not purchased the rifle in question, nor had he committed any other crime. The charges against the plaintiff, however, were not dismissed until February 1, 1972, after the actual purchaser of the rifle used in the shooting had been apprehended. At that time, all charges against the plaintiff were dismissed.

Approximately one year later the defendant wrote a book entitled Chief (JA 47) which, according to the defendant, contained true incidents that occurred while the defendant was Chief of Detectives of the City of New York (JA 48). One of the incidents reported in the defendant's book

on pages 318-330 is the incident concerning the plaintiff's arrest (JA 49-61).

It is in this book that the defendant admits that he was under abnormal pressure to obtain fast results and a quick arrest (JA 50, 51, 53), that the federal agents balked at arresting the plaintiff (JA 52), that it was he who exhorted the United States Attorney to direct the federal agents to immediately arrest the plaintiff (JA 53), that under normal circumstances the defendant would not have ordered the plaintiff arrested (JA 53), but that he did so in this case so that the Russians could be mollified at the United Nations by the news that an arrest had been made (JA 53), that the JDL lawyer's claim that the plaintiff was being "railroaded" to placate the Russians was apparently not unfounded (JA 53), and that, even after the arrest, the defendant doubted that the plaintiff was the sniper (JA 55).

Chief was written by the defendant prior to the institution of this action. Understandably, all of the admissions made in the defendant's book and that version of what transpired regarding the plaintiff's arrest are contradicted and denied by the defendant in his affidavit, sworn to the 13th day of February, 1975, after this action was commenced and the defendant had a motive to tailor his testimony (JA 14-20).

At the time of his wrongful arrest the plaintiff was eighteen years of age and did not reach his majority until August 31, 1974. Immediately after reaching his majority, the plaintiff commenced this action against the

defendant alleging that his constitutional rights had been violated under color of State law (42 U.S.C. 1983) (JA 2-6); that the defendant had conspired to violate the plaintiff's constitutional rights solely because the plaintiff was a member of the JDL in violation of 42 U.S.C. 1985 (JA 6-7); and that the defendant Seedman in his position as Chief of Detectives had knowledge that the wrongs which were done to the plaintiff were about to be committed and had the power to prevent these wrongs from being committed, but refused to do so (42 U.S.C. 1986) (JA 7). The plaintiff Joseph Jaroslawicz is the plaintiff Isaac Jaroslawicz' father and natural guardian and was caused to expend monies to defend his son against the charges wrongfully and falsely brought against Isaac Jaroslawicz (JA 8). Both plaintiffs also sought punitive damages (JA 8).

The defendant made a motion to dismiss the plaintiff's action pursuant to Rule 12 for failure to state a cause of action or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (JA 10).

On or about April 3, 1975, the plaintiffs filed an amended complaint which cured all of the alleged defects in the plaintiffs' initial complaint (JA 65). The defendant then directed the motion to dismiss, or in the alternative for summary judgment, it had initially made against the plaintiffs' original complaint against the amended complaint (JA 65). The District Court

rendered a decision on May 1, 1975 finding that the amended complaint stated a cause of action (JA 65), but then went on to grant the defendant's motion for summary judgment and dismissed the plaintiffs'complaint (JA 72, 73). The decision of the Court below is found on pages JA 64-72).

ARGUMENT

POINT I

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO THE DEFENDANT BY THE COURT BELOW SINCE THE DEFENDANT'S ADMISSIONS CONTAINED IN A BOOK WRITTEN BY HIM DIRECTLY CONTRADICT MANY OF THE STATEMENTS IN THE DEFENDANT'S AFFIDAVIT IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT.

The defendant made a motion to dismiss the complaint for failure to state a cause of action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming that the plaintiffs' complaint did not set forth a cause of action under the Civil Rights Act, 42 U.S.C. 1983, or, in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, claiming that there were no genuine issues as to any material facts and that the defendant was entitled to a judgment as a matter of law (JA 2). The Court below found that the plaintiff's

complaint did set forth a cause of action under the Civil Rights Act, but went on to grant the defendant's motion for summary judgment (JA 64-72).

42 U.S.C. 1983 provides a private right of action for persons who are deprived of

> " * * * any rights, privileges, or immunities secured (to them) by the Constitution and laws"

by any person acting under color of State law. Among those protected Constitutional rights is the right to be free from unlawful arrest and detention. An arrest or search without probable cause is a classic prima facie case in violation of this section. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961); Dowsey v. Wilkins, 467 F.2d 1022 (5th Cir. 1972); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); and Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973). The statute is designed to protect individuals from violations of their rights by those who possess badges of authority granted by the State.

The only defense police officers have to actions brought under Section 1983 are those of good faith and probable cause. Pierson v. Ray, 386 U.S. 547, 557 (1967); Haaf v. Grams, 355 F.Supp. 542, 546 (D.Minn. 1973). In Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F.2d 1339 (2d. Cir. 1972), this Court made it clear that the same standard

was to be made applicable to both actions against federal officers and actions against State officials under 1983, 456 F.2d at 1341, 1348.

In Bivens this Court stated:

> "The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." (456 F.2d at 1348)

In order to properly grant summary judgment to the defendant, the Court below had to find that the defendant had acted in good faith, that he had a reasonable belief that his conduct was lawful and that there was no genuine issue as to any material fact concerning the defendant's defense that he had acted in good faith. The Court below erred in granting summary judgment to the defendant since prior admissions made by the defendant in a book entitled Chief directly contradict certain statements made in his affidavit in support of his motion for summary judgment and which admissions put the defendant's credibility into issue and which issue can only be determined by a jury at a trial of this action and not by the Court on a motion for summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure in pertinent part provides as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

On a motion for summary judgment the Court may consider 'admissions on file'. Moore in his work on Federal Practice has stated:

> "While admissions should be 'on file', they may be established in any appropriate manner: pursuant to Rule 36, subsequently discussed because of its great utility; from answers of a party to interrogatories served under Rule 33; from a letter that is an exhibit in the proceeding; from statements of counsel made in oral or written argument, or at a pre-trial conference. Evidentiary material asserted as an admission, must be admissible in evidence against the party sought to be charged with the admission." (6 Moore, Federal Practice, 56.11(6))

The plaintiff in opposing the defendant's motion for summary judgment submitted as an exhibit the relevant pages of a book admittedly written by the defendant (JA 47-61) which purported to be true (JA 48) wherein the defendant admitted that he was under abnormal pressure to obtain fast results and make a quick arrest in the shooting at the Russian Mission (JA 50, 51, 53), that the federal agents who finally charged the plaintiff had intially balked at arresting the plaintiff (JA 52), that it was the defendant who called the United States Attorney in an attempt to have him direct the federal agents to charge the plaintiff with a crime and that under normal

circumstances the defendant would not have ordered the plaintiff arrested (JA 53), but that he had done so in this case so that the Russians could be mollified (JA 53). He also admitted in essence that the JDL lawyer's claim that the plaintiff was being railroaded to placate the Russians was apparently not unfounded (JA 53) and that even after the plaintiff had been charged with a crime, the defendant still doubted that the plaintiff was the responsible party (JA 55).

The admissions made by the defendant in his book are admissible in evidence against him as an admission by a party-opponent (see Rule 801(d)(2)(A) of the Federal Rules of Evidence. The Federal Rules of Evidence have merely recognized the long standing rule that statements of a party which are inconsistent with his claim in litigation are substantively admissible against him. See Community Counselling Service, Inc. v. Reilly, 317 F.2d 239, 243 (4th Cir. 1963). See also Richardson on Evidence, 10th Ed., page 187 (1973).

There is no question that the defendant's statements in his book should have been considered by the District Court in ruling on the summary judgment motion. This Court in Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 404 (2d. Cir. 1945), approved the lower Court's

reliance upon a letter written by one of the parties which was appended as an exhibit in the proceeding then before it.

The defendant's admissions in his book are entitled to particular credence as substantive evidence in the instant case since they were made prior to the institution of this action and before a motive to tailor or falsify his testimony existed. See, e.g., Ferris v. Sterling, 214 N.Y. 249, 254 (1915), where the Court set out the rule that where the testimony of a witness is assailed as a recent fabrication, evidence of prior consistent statements the witness made prior to the litigation before the motive to falsify exsited may be introduced.

In this case, it is not merely the question of the defendant's credibility which requires that summary judgment be denied although:

> "Ordinarily if there is a real issue as to the credibility of movant's evidentiary materials, his motion for summary judgment must be denied, so that the trier of the facts may resolve the factual issue at trial." Moore's Federal Practice, 56.15(3).

Here, the admissions made by the defendant in his book directly contradict statements made in his affidavit in support of his motion for summary judgment and support the plaintiff's contentions as to when he was arrested and that his arrest took place only because the defendant was under abnormal pressure to obtain quick results from his investigation and since the plaintiff was a member of the JDL, he was made a convenient scapegoat.

The law is clear, however, that the right to be free from unlawful arrest and detention is " * * * guaranteed to all persons, worthy and unworthy, those who have respectable friends and those who do not." Willits v. Garmire, 386 F.Supp. 590, 592 (S.D.Fla. 1974).

The defendant's admissions in his book not only cast his credibility* into doubt, but

> "negates the common law defenses of good faith and probable cause, which under other circumstances may be available in § 1983 actions. See Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973)." Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973)

In Robinson v. Diamond Housing Corporation, 463 F.2d 853, 867 (D.C. Cir. 1972), the Court pointed out that the mere existence of a legitimate reason for acting in a certain manner will not aid a defendant if the jury finds that he was motivated by illegitimate reason. See also Kinzler v. New York Stock Exchange, 62 F.R.D. 196, 202 (S.D.N.Y. 1974).

In our case, even if it were possible that another police officer might be able to have the defense of good faith available to him, that defense

*Aside from the defendant's credibility being questionable because of the directly contradictory statements contained in his book and affidavit in support of his motion for summary judgment, the defendant's veracity is also cast into doubt by such statements found in his affidavit as "That, in sum, the totality of my estate (and then some, to say the least) is sought to be denuded", when in fact, the defendant is well aware that the City of New York is responsible for any judgment entered against him. See New York General Municipal Law, Section 50-j, and in this very proceeding, the defendant is being represented by the Corporation Counsel of the City of New York, with no costs at all for legal fees to the defendant.

would not be available to the defendant in this case if the jury finds that the defendant has admitted in his book that he arrested the plaintiff only because he was under abnormal pressure to obtain a quick arrest and the plaintiff was a convenient scapegoat.

It was error for the Court below to grant summary judgment to the defendant, if for no other reason, only because the admissions contained in his book directly contradict the statements made in his affidavit in support of his motion for summary judgment and require that a jury determine the existing genuine issues of material fact.

POINT II

THE DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE HE FAILED TO SHOW THE ABSENCE OF ANY GENUINE ISSUES OF MATERIAL FACT.

The party seeking summary judgment must produce proper evidentiary materials in support of its motion to show that there is no genuine issue of material fact for the Court to determine at trial. The Advisory Committee notes to the 1963 amendment of Subdivision (c) of Rule 56 states:

> "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

In Adickes v. S. H. Kress & Co., 90 S.Ct. 1598 (1970), the court reversed the granting of a summary judgment motion to a defendant because the defendant had not met its burden of proof of satisfactorily establishing that there was no genuine issue of material fact, although the plaintiff in Adickes had not come forward with any proof to contradict certain allegations which the defendant had made in support of its motion for summary judgment.

The court citing the Advisory Committee's notes on the 1963 amendment to subdivision (c) of Rule 56 made it clear that it is the burden of the party moving for summary judgment to initially show by proper evidentiary material, the absence of a genuine issue concerning any material fact and stated that where the movant had not met its initial burden, the petitioner did not have to come forward with any opposing affidavits or other evidence and the motion for summary judgment should be denied. In the absence of the party moving for summary judgment discharging the burden of proof put upon him, he is not entitled to judgment and no defense is required by the party opposing the motion for summary judgment where the moving party has not met its initial burden. (90 S.Ct. at 1609-1610) See also, 6 Moore's Federal Practice, par. 56.22(2).

In our case, as in Adickes, the defendant has failed to meet his burden of showing the absence of any genuine issue of material fact. The plaintiff had alleged in his complaint that ne was arrested by certain police officers acting under the defendant's command (JA 3-5). The defendant claims in his affidavit in support of his motion for summary judgment that the plaintiff had voluntarily accompanied a police officer to the stationhouse. In his book, the defendant admits that the plaintiff was arrested by a police officer at the corner of 67th Street and Lexington Avenue (JA 51). In support of his motion for summary judgment, the defendant has failed to supply the affidavit of the police officer who the plaintiff allegedly volunteered to accompany to the stationhouse.

The plaintiff in his affidavit opposing the defendant's motion for summary judgment claimed that he was physically restrained from leaving the stationhouse after being forcibly abducted into the stationhouse (JA 39) and that he was compelled to provide fingerprints and palmprints to the New York City Police Department (JA 40). The plaintiff's claims are supported by the affidavit of Harvey J. Michelman, an attorney who was present at the stationhouse while the plaintiff was being detained there and was advised by the defendant that the plaintiff was not free to leave the stationhouse (JA 44-46). Again, the defendant has not come forward with any evidence in support of his motion for summary judgment to dispute

the facts set forth by the plaintiff and in the Michelman affidavit. The only evidence presented by the defendant in support of his motion for summary judgment, that he did not 'arrest' the plaintiff, is the naked statement in his affidavit that the plaintiff was formally charged by federal agents. However:

> "No formal words are required, nor is a declaration necessary at the time of arrest", Moran v. United States, 404 F.2d 663, 666 (10th Cir. 1968)

When the plaintiff was forcibly required to remain in the stationhouse and his freedom of movement restricted, his arrest had, in effect, been completed. See United States v. Johnson, 495 F.2d 378, 381 (4th Cir. 1974). The defendant had the burden of coming forward with some evidentiary material to contest the allegations in the plaintiff and Michelman affidavits. He could not avoid the issue by claiming that the formal booking was done by other authorities, to wit, federal agents (JA 17). There need not be a formal booking in order for there to have been an arrest. Moran v. United States, supra.

Similarly, the plaintiff in his complaint has alleged that the lineup was conducted in such a manner so as to insure that the plaintiff would be selected (JA 4). The defendant in support of his motion for summary

judgment provided no evidentiary materials to contradict the plaintiff's claims. This, despite the fact that it is the proper practice for police departments to maintain a record of the manner in which a lineup was conducted to insure that Constitutional guidelines were complied with and that the lineup was not unduly suggestive. See, e.g., Foster v. California, 394 U.S. 440 (1969). See, also, ALI, a Model Code of Pre Arraignment Procedure § 160.4 (Tent. Draft No. 6, April , 1974). In fact, the defendant has not even provided any information showing what the person who actually did commit the crime looked like so that the Court could determine whether or not it was reasonable to have mistaken the plaintiff as the purchaser if the lineup was not unduly suggestive.

The information regarding the procedures used during the lineup are in the exclusive possession of the defendant and his counsel, the Corporation Counsel for the City of New York.

The burden is upon the party moving for summary judgment to show the absence of any genuine issue of material fact. The defendant here has clearly failed to meet that burden and the Court below erred in granting the defendant's motion for summary judgment.

Michelman (JA 46), who clearly stated that the plaintiff was in custody and not permitted to leave the precinct while he was being interrogated by the defendant.

Similarly, the District Court found as a matter of law that there was no genuine issue of material fact, that the defendant acted in good faith, and that his belief was reasonable (JA 71). The District Court made these findings despite the defendant's admissions that the case against the plaintiff was hardly overwhelming (JA 53), under normal circumstances the plaintiff would not have been arrested, that he was under abnormal pressure to make a quick arrest (JA 51, 53) and that the JDL lawyer's claim that the plaintiff was being railroaded to placate the Russians was not without foundation.

The District Court's finding that there was no genuine issue of material fact with regard to the defendant's "good faith" in arresting the plaintiff is even more astonishing in light of this Court's admonition in Empire Electronics Co., supra, that

> "The District Court must therefore take that view of the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn. 'If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.' Ramsouer v. Midland Valley R. Co., 135 F.2d 101, 106 (8th Cir. 1943). This

> admonition should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions. (emphasis added) 311 F.2d at 180.

See also Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2d Cir. 1971).

Good faith is almost always a question of fact for the jury, especially in a case such as the instant one where the defendant's own admissions have cast his good faith into doubt. The Court in Haaf v. Grams, 355 F.Supp. 542 (D.Minn. 1973), stated in language appropos to the instant case:

> "The only defense police have to actions under Section 1983 is that of good faith and probable cause. Wilhelm v. Turner, 431 F.2d 177 (8th Cir. 1970), cert. denied, 401 U.S. 947, 91 S.Ct. 919, 28 L.Ed.2d 230 (1971); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968); Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968). However, whenever the defense is raised, another fact question is presented. Therefore for all the above reasons, the claim against defendant Grams may not be dismissed." (at 546) (emphasis added)

See also Safeguard Mutual Insurance Co. v. Miller, 472 F.2d 732, 734 (3d. Cir. 1973), where the Court stated that the defendant's good faith in a 1983 action is obviously a disputed issue of fact. The Court in Pierson v. Ray, supra, likewise stated that it was a question of fact for the jury to decide whether or not the police officers had acted in good faith. 386 U.S. at 557. On a motion for summary judgment, the Court cannot try

issues of fact, but can only determine whether or not there are issues of fact to be tried. Lemelson v. Ideal Toy Corporation, 408 F.2d 860, 863 (2d. Cir. 1969); Empire Electronics Co., supra. On a motion for summary judgment, a judge may not draw factual inferences against the party opposing the summary judgment motion. Bragen v. Hudson County News Co., 278 F.2d 615, 618 (3d. Cir. 1960).

The Court below erred in granting the defendant's motion for summary judgment despite the defendant's admissions, placing his credibility in doubt and contradictory evidence supplied by the plaintiff in opposing the motion for summary judgment.

CONCLUSION

The Court below erred in granting the defendant's motion for summary judgment. The defendant's admissions directly contradict critical contentions made by the defendant in his affidavit in support of his motion for summary judgment. In addition, the question of the defendant's good faith is always a question of fact for the jury. The defendant did not meet his burden of showing an abasence of any genuine issue of material fact, and summary judgment should not have been granted. The order of the Court below dismissing the plaintiffs' complaint should be reversed.

Respectfully submitted,

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Attorneys for Plaintiffs-Appellants

Alfred S. Julien
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Of counsel

UNITED STATES COURT OF APPEALS
FOR THE SECDND CIRCUIT

ISAAC JAROSLAWICZ, et ano., **Plaintiffs-Appellants,** *against* **ALBERT A. SEEDMAN,** **Defendant-Appellee.**	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 21st *day of* September *19* 75 *at* **Municipal Bldg., N.Y., N.Y.,**

deponent served the annexed Brief *upon*

W. Bernard Richland

the **Corp Counsel NYC** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James Steele
Print name beneath signature
JAMES A. STEELE

Sworn to before me, this 21st
day of September *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977